IN THE

Supreme Court of the United States

October Term, 1976.

Nos. 76—180
76—183
76—5193
76—5200

J. HENRY SMITH, *et al.*,
Appellants-Defendants,
against
ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *et al.*,
Appellees-Plaintiffs.

APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for The Legal Aid Society of the City of New York, Juvenile Rights Division as *Amicus Curaie.*

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Table of Contents.

TABLE OF AUTHORITIES.

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Interest of *Amicus Curiae*

The Legal Aid Society is a private, non-profit legal assistance agency which, since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Society has a full-time staff in excess of 600 attorneys who provide assistance to more than 200,000

people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus Curiae, the Juvenile Rights Division of the Legal Aid Society has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile proceedings. The Division presently is comprised of 76 trial, appellate and special litigation attorneys and a social services support staff of 36, including 14 persons with masters degrees in social work, whose primary responsibility is the representation of juveniles who are the subject of Family Court proceedings in New York City. In 1975, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in 17,439 proceedings. The cases included juvenile delinquency, abuse and neglect, person-in-need-of supervision (PINS), special education, violation of probation, extension, termination or transfer of placement within the child care system, family offense, guardianship, termination of parental rights, custody and foster care review proceedings.

In addition, staff members represent children in a myriad of cases related to but separate from Family Court assignment, and on a daily basis deal with the home life and foster care problems of New York City area children. Charles Schinitsky who has been attorney-in-charge of the Division since 1962, regularly has been asked to testify at local, state and federal legislative and administrative hearings concerning care and protection of children.

Based upon its experience, *Amicus* has consistently maintained that children have a right to live in their natural

homes, that they should be removed from those homes and placed into foster care only as a last resort and that they should then be returned to their homes as soon as possible. *Amicus* therefore has urged the introduction of extensive community services so that wherever possible children remain at home and will not have to enter the costly foster care system.[1]

The central issue presented in this case—whether a due process evidentiary hearing should be provided for children who are removed from a foster home—is obviously of great importance to the thousands of youngsters in New York City represented by the Juvenile Rights Division, many of whom are presently in foster care.

Amicus is submitting this brief because of its concern about the impact of this case on its clients. *Amicus,* as the single largest legal representative of children in the United States, wishes to provide this Court with an analysis of the issues from the viewpoint of the foster child which may not otherwise be presented.

Statement of the Case

This class action was brought pursuant to 28 U.S.C. §§ 1343(3) and (4) and 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York on behalf of a class of foster parents individually and as the "next friend" of a class of foster children residing in their homes to declare unconstitutional and enjoin enforcement of New York Social Services Law

[1] In 1974, the total expenditures in foster care for New York City children alone were $252,805,000. [New York State Board of Social Welfare, "Foster Care Needs and Alternatives, p. 47 (1974) ("Bernstein Report.")].

§§ 383(2) and 400 and 18 New York Code Rules and Regulations ("N.Y.C.R.R.") 450.14, which laws govern, *inter alia,* the transfer or removal of children from foster care.

By order dated December 10, 1974, District Court Judge Robert Carter appointed independent counsel to represent the children, ruling that representation of the children by counsel for the foster parents presented a conflict of interest.

By judgment and order entered April 14, 1976, a three-judge court of the United States District Court for the Southern District of New York, one judge dissenting, declared the challenged laws and regulations to be unconstitutional as applied and enjoined defendants-appellants from removing or authorizing the removal of foster children from foster homes in which they have lived continuously for more than one year without notice and a pre-removal hearing at which the child, natural parents and foster parents could present relevant information. The court directed the state and local defendants to formulate suitable procedures for the hearings which would be mandatory, to provide an independent hearing examiner, and to provide the child with an "adult representative" whenever the child's age, sophistication and abilities to communicate his/her true feelings require it. *Offer v. Dumpson,* 418 F. Supp. 277 (S.D.N.Y. 1976).

The judgment and order of the three-judge court was stayed pending application for a further stay to this Court. On May 12, 1976, an interim stay was granted by Mr. Justice Marshall pending further application and order of the Court, which order was granted by the Court on May 24, 1976, pending timely filing of the appeal. Probable jurisdiction was noted by this Court on October 12, 1976. 45 U.S.L.W. 3272-3.

Plaintiffs-Appellees are the Organization of Foster Families For Equality and Reform and Madeline Smith, Ralph and Christine Goldberg, and George and Dorothy Lhotan. Defendants-Appellants are state and local Department of Social Services officials and intervenor-natural parents. Counsel appointed for the plaintiff children filed an answer in the district court and is therefore an appellant herein.

Amicus has received consent from both appellants and appellees to file this Brief.

Introduction and Summary of Argument.

Whenever children are the aggrieved parties in a case, courts are faced with unique and difficult problems. It is rare that the legal rights of children achieve definition through the children's independent assertion of their interests. Rather, various adults who claim to be representing the interests and rights of the children promote the disposition which they believe to be "in the children's best interests" or in accord with the children's legal rights. The instant case presents this Court with a striking example of how the independent interests and rights of children can be obfuscated and lost because of the competing and, perhaps, selfish attempts by adults to legitimize their own subjective judgment as the controlling factor in determining where a child should live.

No adult in this case, either as counsel or party, represented the children as persons who have independent rights and analyzed the issues for the lower court from

the child's point of view.[2] *Amicus* believes that an objective evaluation of the issues presented from the child's standpoint teaches that a child should receive an automatic administrative hearing before transfer from a particular foster home to another foster care placement, but should not receive such hearing when returning to his/her natural home.

This Court has already recognized that children are independent persons who "are protected by the constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth,* —— U. S. ——, 96 S. Ct. 2831, 2843 (1976); *Goss v. Lopez,* 419 U. S. 565 (1975); *In re Gault,* 387 U. S. 1, 13 (1967). *Amicus* submits that a child, as an independent person to whom constitutional protections apply, who is arbitrarily removed by the State from a family home, albeit a foster home, is deprived of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The nature of

[2]The foster parents in the case believe that their home is better for foster children than the children's natural home and seek to retain custody over children without adopting them even though their natural parents want them returned. The natural parents who have voluntarily placed their children seek return of their children without having outside persons, specifically foster parents, intervene. The child care officials assert that they know what is best for the child and may transfer a child under their custody anywhere without being constitutionally required to provide due process protections. Even the counsel appointed to represent the children by the district court argued that because child care agencies act in the child's "best interests" scrutinizing their decision concerning placement is unnecessary. *Amicus* takes note that the children's counsel, who is a well respected lawyer in the child care area, had represented child care agencies as their counsel for many years before being appointed as the children's counsel in this case. This involvement was the basis for motions on the part of the foster parents to have her relieved as counsel.

the liberty interest—a known and stable home environment—is, perhaps, the most significant variable in securing a child's well being. *Offer v. Dumpson, supra,* at 282-283.

Amicus' experience shows that a transfer of a foster child from a foster home to which attachments have been formed to another foster home or to an institution subjects the child to a "grievous loss" mandating due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 170-172 (1951) (Frankfurter, concurring); *Meachum v. Fano,* —— U. S. ——, 96 S. Ct. 2532 (1976). In either transfer, the child is thrown into an alien environment in which he/she has no biological or even psychological bonds. This potentially traumatic experience has often resulted in social and psychological damage to *Amicus'* clients.

A child's transfer from his/her foster home to a foster care institution results in a more severe deprivation than a transfer to another foster home. The deplorable conditions to which children have been subjected in institutions have been well-documented. In fact, according to the Bernstein Report, *infra,* at 27, all 3,951 New York City foster children in general institutions were inappropriately placed.

However, a radically different situation is presented when a child is returned to his/her natural home from a foster home. Although a child is not the property of his/her natural parents [cf. *Planned Parenthood of Central Missouri v. Danforth, supra*], this court has firmly supported the integrity of the biological family unit. *Stanley v. Illinois,* 405 U. S. 645, 650-652 (1972); *May v. Anderson,* 345 U. S. 528, 533 (1953); *Meyer v. Nebraska,* 262 U. S. 390 (1923); *Pierce v. Society of Sisters,* 268 U. S. 510 (1925).

". . . [T]he future life of the mother and child together is premised upon 'the child's best interests,'" *In re Jewish Child Care Association,* 5 N. Y. 2d 222, 230 (1959); "and the child has a 'right' to be reared by its [biological] parent." *Bennett v. Jeffreys,* —— N. Y. 2d —— (1976).

Children who are removed from a foster home to return to their natural parents reassume the liberty interest they possess in their natural family relationship. In all but a few cases the "gain" derived from a child's return to the natural parents more than offsets any "loss" resulting from the removal from a foster home.

Unfortunately, because a few children have an attachment with their foster family which outweighs the benefit derived from their return to their natural family, an anomalous situation has been presented to the Court. Can a fair administrative hearing be implemented *for children,* which protects those who seek to remain in a foster home without impinging the rights of those whose interests lie in reestablishing their natural home? *Amicus* thinks not.

An automatic hearing, as required by the lower court order, appears logical in light of a child's inability to assert his right without adult assistance. But subjecting all children to an administrative hearing even before they can return to their natural parents, will have substantial and damaging effects on those whose predominant liberty interest lies in their natural family relationship.

Not only will an administrative hearing delay a child's return, but child care agencies may forego making a decision to return children to their natural parents because of bureaucratic reluctance to hold administrative hearings. Furthermore, children may be "brainwashed," by the foster parents who are paid to care for them, into falsely believing that their natural parents are unconcerned about them.

The description of the child care system contained in this brief illuminates the methods by which an agency or foster parent may delay or prevent the child's return to his/her natural home. Foster care review [Social Services Law §392 (SSL)] and other equitable remedies (Article 78, CPLR) are used by agencies and foster parents to maintain custody over a child. Moreover neglect and abuse proceedings can be instituted under Article 10 of the Family Court Act (FCA). Significantly, the New York child care system is historically biased in favor of placing children out of their homes and retaining them in foster care (Sister Mary Paul, *infra*).

Amicus suggests to the Court that it apply a balancing test in order to resolve the questions raised in these unprecedented circumstances where an automatic administrative hearing will violate constitutional rights of the persons given the hearing.

In balancing all the competing interests involved [*Cafeteria and Restaurant Workers v. McElroy,* 367 U. S. 886, 895 (1961); *Joint Anti-Facist Refugee Committee v. McGrath, supra,* at 163], *Amicus* has concluded that the constitutional rights of more children would be impinged than protected through the introduction of a due process evidentiary hearing before their return to their natural family. In effect, an administrative hearing is not due. *Morrisey v. Brewer,* 408 U. S. 471 (1972).

However, *Amicus* emphasizes that it is not suggesting that individual children may not find methods to challenge their removal from a foster home even when they are returning to their natural home either through the courts or otherwise.

Therefore, the determination of the district court that New York Social Services Law §§ 383(2) and 400 are unconstitutional because they do not provide a foster child

with a due process hearing right, at least when applied to his removal from his foster home and transfer to another foster care placement, is correct.

On the other hand, the lower court ruling requiring an automatic administrative hearing for the child prior to return to the natural parent, should be reversed.

Description of New York Child Care System

New York State has established an extensive child welfare system composed of a growing network of foster care services providing residential care for those children determined to be destitute, dependent, abandoned, neglected and/or abused, delinquent or in need of supervision.

Children from New York City are placed in the State's foster care system for a variety of reasons. Almost 80% enter foster placement due to parental problems. These problems, many of which are temporary in nature, range from mental or physical illness to an inability or unwillingness to care for the child.[3] However, only about 1% of the children in placement have been adjudicated neglected or abused and only 3% are there because of the death of both parents and the absence of any other person to care for them.[4] Problems attributable to the child, usually emotional or behavioral in nature, amount to about 14% of the placements.[5]

The users of New York's child care system are overwhelmingly poor and from minority groups. Although

[3]Bernstein Report, *supra,* at page 11.

[4]*Id.* pages 10-11.

[5]*Id.* page 10.

the total population of children in foster care from New York City has climbed dramatically over the last 15 years, there has been a major shift in the ethnic composition of that population. In 1960, of the total number of children in foster care 7,660 (41.6%) were White, 7,087 (38.5%) were Black and 3,677 (19.9%) were Hispanic.[6] As of June 30, 1976, there were 28,451 children in foster care from New York City.[7] Of those children, 14,671 or 51.6% were Black; 7,247 or 25.5% were Puerto Rican; 4,991 or 17.5% were White and 1,542 or 5.4% were Interracial, Oriental or Other.[8] A total of 17,426 of these children were in foster homes, while the remaining 11,025 were in other foster care placements, which include group homes and residences, shelters and general institutions.[9]

Of all children from New York City in foster care, over 50% are from female headed families receiving Aid to Dependent Children.[10] According to the 1970 Census, 45.7% of the female headed families with children in New York City in 1969 reported incomes below the poverty level, and about 56% of all children living in female headed families were living in poverty in 1969.[11]

[6]*Id.*, page 4, Table 1.

[7]It can be projected that about another 20,000 children are in foster care statewide. Temporary State Commission on Welfare, "Barriers to the Freeing of Children for Adoption" (1976).

[8]Child Welfare Information Services, Inc., "Characteristics of Children in Foster Care, New York City Reports," Table No. 2 (June 30, 1976) ("CWIS").

[9]*Id.*, Table No. 9.

[10]Foundation for Child Development, *State of the Child: New York City*, page 61, (April, 1976) Library of Congress Catalog Card No. 76-20228. ("State of the Child")

[11]*Id.* page 15.

Nearly one-half of the children in New York City living in families with income below the poverty level in 1970 were Black and one-third were Puerto Rican. Black children were therefore twice as likely as White children to be living in poverty (32% versus 16%).[12]

Thus, it is predominantly this class of children—children living in poverty and experiencing the "effects of discrimination"—that comprises New York's foster care population.[13]

Analyzed by age, the foster care population as of June 30, 1976, was composed of 7.8% children 0-2 years old, 10.1% 3-5 years old, 25.1% 6-10 years old, 28.5% 11-14 years old and 28.6% 15 years and older.[14] Of the children in foster homes, 7% were 0-2 years; 18% were 3-5 years; 25% were 6-9 years; 24% were 10-13 years; 19% were 14-17 years; and 6% were 18-21.[15]

Moreover, it has been found that the longer a child remains in foster care, the less likely he/she is to leave, and the length of time a child remains in foster care directly correlates with his ethnic identity, i. e., White children

[12]*Id.*, Table No. 9.

[13]*Id.*, Table No. 4.

[14]CWIS, *supra*, at Table No. 18.

[12]*Id.* page 23.

[13]Bernstein Report, *supra*, at page 10.

[14]*Id.*, Table No. 4.

[15]CWIS, *supra*, at Table No. 18.

move out of the system more quickly than Black and Puerto Rican children. [16]

In a longitudinal study of 624 children who entered foster care in 1966, Dr. David Fanshel found that 39% of the children were still in foster care at the close of the study five years later.[17] Twenty-four percent of the sample had been discharged to the parent in the first year, 13% in the second year, 8% in the third year, 9% in the fourth year, and 7% in the fifth year.[18] Furthermore, Dr. Fanshel found that the longer a child was in foster care, the more he was subject to replacement. In the same sample of 624 children, approximately 200 experienced inter or intra agency transfer. [19] Of the children discharged in the first year, 80% were in one placement. Of those discharged in the second year, 60% remained in one placement, and of those discharged in the third year, 39% remained in one placement during their stay in foster care.[20]

Presently, a child enters the New York child care system either through a voluntary placement by a parent or legal guardian or through an order of the Family Court. Seventy-eight percent of children in foster care

[16]Deposition of Dr. David Fanshel taken on April 8, 1975 (*Offer v. Dumpson, supra*). The average length of stay in foster care in New York City is 5.4 years. Research Center, Child Welfare League of America. "A Second Chance for Families. Evaluation of a Program to Reduce Foster Care," page 8 (1976). ("A Second Chance For Families.")

[17]Fanshel Deposition, *supra*, at page 22.

[18]*Id.*, page 22.

[19]*Id.*, page 24.

[20]*Id.*, page 125.

are voluntarily placed and twenty-two percent are court ordered placements.[21] In both cases, the Commissioner of Social Services, with whom the child is placed, has authority to place the child either in a foster home or facility under the direct supervision of the local Department of Social Services or in the care of a voluntary child care agency licensed or chartered by the State Board of Social Welfare and under contractual agreement with the local Department of Social Services.[22]

Children placed directly by the New York Family Court into foster care as a result of child protective,[23] juvenile delinquency [24] and person-in-need-of-supervision[25] proceedings are afforded certain due process rights as provided for within the New York Family Court Act.

The alternative route for a child into foster care allows a parent or guardian to transfer voluntarily custody and care of the child to the Commissioner of Social Services.[26] Voluntarily placed children are statutorily defined as "destitute," "dependent" or "abandoned" children. Within 30 days of the entry of the child into the foster care system, the Commissioner of Social Services petitions the

[21]CWIS, *supra*, at Table No. 11.

[22]New York Social Services Law §398(6)(g). About 85% of the children in foster care from New York City are in placement with voluntary child care agencies. Outside of New York City, most children are in foster homes and facilities under the direct supervision of the local Department of Social Services.

[23]FCA §1012.

[24]FCA §731.

[25]FCA §732.

[26]SSL §358-a.

Family Court for approval of the placement.[27] This hearing, however, is a perfunctory one and the question of the child's actual need for placement is not closely scrutinized.

> ". . . Children [are matched] with voluntary child care agencies' services based on their self-defined admissions criteria [which] must inevitably contribute to decisions based on expedience. Thus, some trained observers have come to question whether the numbers of children now in foster care and the kinds of care offered them may not be largely a function of spaces available rather than empirical reflections of the needs of children and families."[28]

A parent or guardian may request the return of his/her child at any time. If the Commissioner of Social Services or the child care agency with which the child resides denies the request or does not act, the parent or guardian may commence a proceeding in Family Court or file a writ of habeas corpus for the return of the child.[29] If the Commissioner of Social Services or child care agency has reason to believe that a return of the child to the parent making the request would result in neglect or abuse, A PETITION MAY BE FILED IN THE FAMILY COURT PURSUANT TO F.C.A. ARTICLE 10.

Regardless of how a child enters foster care his/her status is subject to review by the Family Court at various intervals during the placement. In the case of children placed directly by the Family Court, the placement is for an initial 18 month period. At the expiration of this period, the court, after a hearing, may make successive

[27]SSL §358-a. This hearing is mandatory for those children eligible for AFDC funds while in foster care and is discretionary for those children not eligible.

[28]Sister Mary Paul, New York State Board of Social Welfare, "Criteria for Foster Placement and Alternatives to Foster Care," p. 1 (1975) ("Sister Mary Paul").

[29]SSL §384-a.

extensions of the placement for 12 month periods. Alternatively, it may order the child care agency with which the child is in placement either to make a more diligent effort to assist the parent in the return of his/her child or to institute a proceeding to legally free the child for adoption or to allow the foster parent to do so. [30]

In the case of the voluntarily placed child, Social Services Law § 392 provides that within 18 months of placement the child care agency or foster parent with whom the child resides must petition the Family Court and request review of the child's status. At that time the court may order that foster care be continued; that the agency institute a proceeding to free the child for adoption and if it fails to do so that the foster parents be allowed to; that the agency encourage and strengthen the child-parent relationship in order to facilitate the child's return home; or that the child, if legally free, be placed for adoption.[31]

The statute also provides that the court shall possess continuing jurisdiction over the foster care placement and shall rehear the matter whenever it deems necessary, or upon petition by any party, but at least every twenty-four months.[32]

Therefore, in the case of both the voluntarily placed child and the court placed child, egress from the child care system is presently strewn with statutory obstacles. The child placed through court order is subject to successive extensions of placement. The voluntarily placed child may languish in foster care even following a parental request for his/her return because the child care agency

[30]FCA §1055.

[31]SSL §392.

[32]SSL §392(10).

refuses to relinquish custody.[33] The parent or child must then petition the Family Court or institute a habeas corpus proceeding in New York State Supreme Court.[34] Moreover, a foster parent can impede a child's return to his/her natural home through § 392 of the Social Services Law or by instituting an equity action under Article 78 of the New York Practice Law and Rules.

As previously indicated, it is only the poor who must rely on New York's public foster care system. Families in the middle and upper income brackets who need services or temporary care for their children are usually able to purchase those services, to place their children in private boarding schools or to rely on relatives. Therefore, only the poor are subject to state scrutiny and procedures when a child and parent wish to reunite following the child's stay elsewhere.

Amicus' experience shows that most children in foster care wish to return to their biological parents whenever possible. Often, these children believe, justifiably, that they were unnecessarily removed from their families in the first instance.

> "[W]e are constrained by the historical set of a resource system that is largely placement oriented. Often what is logically appropriate, e. g., locally based family-centered, preventive and sustaining services, is in very short supply because funding supports a history of agency service." Sister Mary Paul, *supra,* at pages 9-10.

This historical bias toward placing children out of their home is more disturbing, in the opinion of *Amicus,* because the vast majority of children who are removed from their natural homes are Black and Hispanic and poor.

[33]SSL §384-a.

[34]*Id.*

(see pp. 10 to 12, *ante.*) *Amicus* perceives the placement-oriented child care system in New York as having a deleterious effect on the functioning of those families in society who are least able to protect their legal and moral rights.

"Many of the children entering foster care for a presumably temporary period get locked into the system for prolonged periods."[35] The child-caring agency invests little, if any time, in helping natural families assume the child-caring role.[36]

> "The system operates to perpetuate itself. Child caring agencies are in the placement 'business' and like all organizations tend to structure their activities in ways which are self perpetuating. The plan for the *majority of children is continued foster care,* with no time limits set for adoption or return home."[37]

The delay in a child's return to his/her natural home now resulting from the statutory scheme and agency bias in favor of foster care will be compounded by the introduction of the automatic administrative hearing ordered by the lower court. Moreover, foster parents can maintain control over a child until the hearing procedure and subsequent appeals are completed. In effect, children will remain in limbo for a longer period of time without having a home which he/she knows to be permanent.

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[35] *A Second Chance for Families, supra,* at page 118.

[36] Gibbs, Zephora T., "Reuniting Families," Field Foundation Project on Child Care, page 13 (June, 1971).

[37] *Id.*

ARGUMENT

The transfer of a child from a particular foster home to another foster care placement constitutes a deprivation of liberty which mandates procedural due process protections. However, when a child is to be returned to the natural home no procedural protections are due because the introduction of a due process evidentiary hearing cannot avoid infringing upon the predominant liberty interest that most children have in their natural family relationship.

This Court has established that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault, supra,* at 13 (1967). In *Gault,* the Court held that the claimed *parens patriae* role of the state did not justify the absence of a judicial due process hearing before commitment of an alleged delinquent child to a reformatory.

> "[J]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." (*In re Gault, supra,* at 18.)

More recently, in *Goss v. Lopez, supra,* this Court found that public school children could not be suspended from school, even for under ten days, without prior rudimentary procedures.

In both the juvenile justice and school systems, *Amicus* submits, the application of procedural due process has had a salubrious effect. Despite continued state protests that an "adversary" atmosphere can hamper its efforts to act in a child's "best interests," holding state officials accountable for their actions better assures that such ac-

tions meet the particular state interest involved.[38] Cf. *Matter of Lavette M.*, 35 N. Y. 2d 136 (1974).

> "[F]airness can rarely be obtained by secret, one-sided determination of the facts decisive of rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." (*Joint Anti-Fascist Refugee Committee v. McGrath, supra; Goss v. Lopez, supra,* at 580.)

While the due process clause has no application unless State action may result in a "loss" to the individual involved (*Joint Anti-Fascist Refugee Committee v. McGrath, supra*), in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents of State College v. Roth,* 408 U. S. 564, 571 (1972); *Goss v. Lopez, supra,* at 575-576; *Meachum v. Fano, supra; Morrisey v. Brewer, supra; Fuentes*

[38]For example, intervention by social workers from the Juvenile Rights Division of The Legal Aid Society ("JRD") into the dispositional phase of New York City Family Court juvenile cases may have resulted in less recidivism. JRD clients against whom status offense ("PINS") petitions were filed between July, 1973, and May, 1974, who were referred by their attorney to a JRD social worker have shown a recidivist rate, through January 31, 1975, of 11.5%. Those whose dispositional needs were suggested to the Court only by State social workers, who include probation officers, have had a recidivist rate of 23.2%. (Legal Aid Society Report to New York City Criminal Justice Coordinating Council, 1975).

Furthermore, school principals have been known not to be infallible when evaluating the necessity and benefit of a school suspension [Children's Defense Fund of the Washington Research Project, Inc., Children Out of School in America, pp. 117-150, (1974) (Library of Congress No. 74-20229)].

v. Shevin, 407 U. S. 67, 86 (1972). As long as the deprivation is not *de minimis,* its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Goss v. Lopez, supra,* at 576; *Sniadach v. Family Finance Corp.,* 395 U. S. 337, 342 (1969) (Harlan, J., concurring).

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colleges v. Roth, supra,* at 569; *Wolff v. McDonnell,* 418 U. S. 539 (1974); *Bell v. Burson,* 402 U. S. 535 (1971); *Goldberg v. Kelly,* 397 U. S. 254 (1970). A cognizable liberty or property interest can either originate in the Constitution or be created "by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez, supra,* at 271-572; *Meachum v. Fano, supra,* at 2539.

In *Gault,* this Court held that the liberty right of a child, protected in the Constitution itself, mandated application of procedural due process. The liberty interest of a child is clear when the state attempts to remove him from his family and confine him in a correctional institution.

In *Goss,* this Court found that children were entitled to procedural due process before school suspension pursuant to both the ban against arbitrary deprivations of liberty under the Due Process Clause and the property interest which they had obtained to an education under state law.

The majority opinion of the three-judge court in the case at bar did not articulate a constitutionally cognizable interest in a child to remain in a foster home, either

through the Constitution itself or in a state law. It is clear that children have no right to remain in a foster home under New York State law. To the contrary, § 383(2) of the New York State Social Services Law, the application of which was declared unconstitutional by the district court, authorizes the child care agency which has custody over a child "in its discretion [to] remove such child from the home where placed or boarded." Similarly, § 400 of the Social Services Law, which was also declared to violate the Due Process Clause, permits City child-care officials to remove children unilaterally from "family homes" under their authority.[39]

However, as an independent "person" to whom constitutional protections apply, a child who is arbitrarily removed by the state from a family home, albeit a foster home, is deprived of a liberty interest protected by the Fourteenth Amendment. *In re Gault, supra.* It is basic to our notion of society, as well as to a particular child's well-being, that the child live in safe and secure circumstances where he may be well cared for and protected. Thus the nature of the liberty interest—a known and stable home environment—is one to which due process applies.[40] (See subpoint "B," *infra.*)

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[39]The district court also held that a state regulation (18 N.Y.C.R.R. § 450.14), which allows foster parents to request a post-removal hearing, is constitutionally defective, even though the court found no constitutional rights in foster parents.

[40]Experience must reject an argument that the state's expertise in child care renders procedural due process meaningless.

According to the Bernstein Report, *supra,* at page 37, all 3,951 children in general institutions were inappropriately placed; 2,094 of the 28,800 New York City children in foster care (7.3%) should have been in their own homes, another 3,669 children (12.6%) should have already have been placed for adoption and 3,712 of the 13,185 children in foster homes should have been elsewhere (p. 29). Interestingly, the study concluded that a surplus in available foster homes will continue through 1985 (p. 37).

Therefore, the determination of the district court that New York Social Services Law §§ 383(2) and 400 are unconstitutional because they do not provide a foster child with a due process hearing right, at least when applied to his removal from his foster home and transfer to another foster care placement, is correct.

On the other hand, as more fully appears below, the lower court ruling requiring an automatic administrative hearing for the child prior to return to the natural parent, must be reversed.

A. No hearing is required when foster children are returned to the natural home.

A child is not the "property" of his/her natural parents. But few would disagree that the formation of a healthy and secure relationship between a child and his/her natural parents can provide a significant foundation for the child's positive social adjustment. Indeed, this Court has firmly supported the integrity of the biological family unit. *Stanley v. Illinois, supra,* at 650-652; *May v. Anderson, supra,* at 533; *Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra.*

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply no hinder." (*Prince v. Massachusetts,* 321 U. S. 158, 166 [1944].)

State interference with the natural family unit constitutes a deprivation of "a basic liberty," fundamental to the very existence of the human race. *Skinner v. Oklahoma,* 316 U. S. 535, 541 (1942). Hence, this Court has found that only under the most compelling circumstances may the state intervene in the parent-child relationship.

May v. Anderson, supra; Wisconsin v. Yoder, 406 U. S. 205, 213 (1972).

Likewise, the highest court in New York State has recognized that "[c]hild and parent are entitled to be together, unless compelling reason stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child . . ." *Spence-Chapin Adoption Service v. Polk,* 29 N. Y. 2d 196, 199 (1971). The recognition and preservation of the natural parent's "primary love and custodial interest, and the future life of the mother and child together . . ." have been premised upon "the child's best interests." *In re Jewish Child Care Association, supra,* at 230 (1959).[41]

Children possess a liberty interest in the preservation of their natural home independent of the parents' right to maintain custody of their children. Waiver of the parental right does not extinguish the child's liberty interest since parents are morally and legally obligated to provide care for their children. E. g., *Prince v. Massachusetts, supra;* Family Court Act §§ 561, 562 ("proceedings to compel support by mother and father").

Recognizing this independent interest, the New York State Court of Appeals recently ruled that "[t]he [biological] parent has a 'right' to rear its child, and the child has a 'right' to be reared by its [biological] parent."

[41]This interest is sometimes referred to as the right to "family integrity." Cf. *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10, 15 (S.D. Iowa 1975); *Roe v. Conn.,* 417 F. Supp. 769, 777 (M.D. Ala. 1976). It is protected as "liberty" by the due process clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399, under the principle of privacy, *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Roe v. Wade,* 410 U.S. 113 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972), and by the equal protection clause of the Fourteenth Amendment, *Stanley v. Illinois, supra.*

Bennett v. Jeffreys, supra. In sum, our judiciary has recognized the liberty interest of a child in his natural family relationship.

Children who are removed from a foster home to return to their natural parents are deprived of that liberty interest which has attached to their foster family relationship (see pp. 21 to 22, *ante*). But in turn they reassume the liberty interest they possess in their natural family relationship of which they had been deprived when placed, often arbitrarily and without sufficient procedural protections. Thus, the question is raised as to which "liberty interest" is predominant.

Amicus submits that in all but a few cases the "gain" derived from a child's return to the natural parents more than offsets any "loss" resulting from the removal from a foster home. In essence, the termination of the child's liberty interest in his foster home produces a significant gain rather than a loss when his biological family unit is reestablished.[42] Therefore, in this specific and unusual situation, the overall state action obviously cannot be said to "cause a sufficiently grievous loss to amount to a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment." *Meachum v. Fano, supra,* at 2540 (Stevens, J., dissenting); *Mathews v. Eldridge,* —— U. S. ——, 96 S. Ct. 893, 902 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* at 168.

[42]Admittedly, the foster care system, all too often, provides long-term care rather than meeting its mandate to give *temporary* care to children until they are able to return home or are adopted. *Spence-Chapin Adoption Service v. Polk, supra; In re Jewish Child Care Association, supra.* However, the general failure of the system to fulfill its mandate should not be legitimized by prolonging the "temporary" placement of those children who can return home.

The experience of *Amicus* dictates, however, that a few children have an attachment with their foster family which outweighs the benefit derived from their return to their natural family. These are exceptions. Yet, they are difficult to ignore since in these exceptional cases a deprivation may occur which cannot be considered *de minimis*. *Board of Regents v. Roth, supra; Goss v. Lopez, supra.* Thus, at first glance, it would appear that a due process hearing mechanism could be instituted to protect the exceptions without impinging the right of the majority to return expeditiously to their natural home.

Unfortunately, an anomalous situation has been presented to the courts. The district court's holding that a hearing "should be provided *as a matter of course*" (418 F. Supp., *supra,* at 285) (emphasis supplied) appears logical in light of a child's inability to assert his right without adult assistance. The ability of a child to "waive" a hearing voluntarily and informedly is suspect to say the least. But this is not a situation where implementation of procedural mechanisms before state action will protect the constitutional rights of some without harming others who would be personally satisfied with the state action. E. g., *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F. 2d 923, 927 (2d Cir. 1968); *Lynch v. Baxley,* 386 F. Supp. 378, 386 (M. D. Ala. 1974). Rather, subjecting all children to a procedural hearing before they can return from a foster home to their natural home will have substantial and damaging substantive effects on the vast majority whose predominant liberty interest lies in their natural family relationship.

First, any procedural mechanisms designed to scrutinize the propriety of a child's return from foster care to his

natural home will result in delay.[43] Children whose rights and needs can best be met with their natural family will be compelled to undergo a further factual inquiry into and interference with their family relationship before being permitted to live with their biological parents, reinforcing the existing bias against returning children to their natural home (see "Description of New York Child-care System," *ante*).

Second, there would be grave danger that child-care agencies would forego making a decision to return children to their natural parents because of bureaucratic reluctance to hold administrative hearings. From a bureaucratic point of view the easier course would be to perpetuate the foster home placement, especially in a placement oriented system (p. 18, *ante*). As a result, children who were supposedly placed for temporary care would linger away from their natural family.

The district court seemingly ignored the substantial loss to a child whose reunion with his biological family unit is delayed by more extensive bureaucratic red-tape then now exists.[44] If, as the district court appears to

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[43]It is important to note that presently child care agencies evaluate the natural home before returning the child to it. If the agency believes the home to be unfit, it has judicial remedies to prevent the natural parents from regaining custody. (pp. 15 to 18, *ante*).

[44]The description of the child care system contained in this brief illuminates the already dilatory process now in existence to return a child to his/her natural home. For example, child care agencies investigate the home before a decision is made to return a child. Moreover, foster parents have several ways of delaying a child's return, including seeking a stay of the removal and a hearing under § 392 of the Family Court Act (if the child has resided with them for 18 months) or even instituting a general equity action (Article 78 of the New York Civil Practice Law and Rules).

have said, when a child is to be returned to his natural home the hearing will only involve the question of whether the evidence indicates "abuse" or "neglect" (418 F. Supp., *supra,* at 283), its "salutary function" (*id.*), given the already existing protections against "abuse" and "neglect," is unequivocally outweighed by the deleterious effect of delaying a child's return to his natural home.

On the other hand, if the hearing is likely to establish under FCA, Article 10, a less stringent standard than "abuse" or "neglect" for retaining a child out of his natural home, *Amicus* would strongly object to such standard as violative of a child's liberty right to his natural family relationship. Cf. *Stanley v. Illinois, supra; May v. Anderson, supra; Spence-Chapin Adoption Service v. Polk, supra; Bennett v. Jeffreys, supra.*

Equally disturbing is the likelihood that children may be "brainwashed" into falsely believing that their natural parents are unconcerned about them by persons who have an interest, perhaps financial, in maintaining custody of the child.[45] In the previously cited Gibbs Report, *supra,* at page 18, a study concerning the feasibility of earlier return home of children in foster care, it is stated that:

> "There seems to be a bias operating against the natural family. . . . The bias against the natural family is transferred to the children. They are made to feel that it is wrong to want to be with their natural families. It is preferable to want to remain in the foster setting."

[45]Foster parents receive about $2,000 annually to care for a child, plus a clothing, dental and medical allowance. [*Offer v. Dumpson, supra,* at 281n. 11]. Although *Amicus* does not suggest that all foster parents are financially motivated, the Court should note that the Bernstein Report, *supra,* at 37 suggests an oversupply of foster homes.

An automatic hearing will violate the liberty rights of children in foster care who seek to return to their natural homes. The delay which will result from more extensive bureaucratic procedures than now exist will produce a continuing substantive constitutional violation.

Amicus suggests to the Court that it apply a balancing test in order to resolve the questions raised in this unprecedented situtaion where an automatic administrative hearing will violate constitutional rights of the persons given the hearing. "Rules of procedure" . . . should . . . be shaped by the consequences which follow their adoption." *Wolff v. McDonnell, supra,* at 567.

> "'Due Process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [It is] compounded of history, reason, the past course of decisions. . . ." (*Joint Anti-Fascist Refugee Committee v. McGrath, supra,* at 162-163 [concurring opinion]; *Cafeteria and Restaurant Workers v. McElroy, supra,* at 895.)

In balancing all the competing interests involved (*Cafeteria and Restaurant Workers v. McElroy,* 367, *supra,* at 895; *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* at 163), *Amicus* has concluded that the constitutional rights of more children would be impinged than protected through the introduction of a due process evidentiary hearing before their return to their natural family. In effect, an administrative hearing is not due. *Morrisey v. Brewer, supra.*

Amicus emphasizes that it is not suggesting that individual children may not challenge their removal from a foster home either through the courts or otherwise even when they are returning to their natural home. Rather, *Amicus* submits that given the "time, place and circumstances" (*McGrath, supra*), of the present child

care system an administrative hearing before children are returned to their natural homes will, on balance, thwart rather than serve the rights of children in foster care.[46]

B. A pre-removal due process evidentiary hearing is required when a child is to be transferred from a particular foster home to another foster care placement.

When a child is subjected to a transfer from one foster home to another or from a foster home to an institution, the liberty interest in his foster family, which is severed by the state action, is not offset by a subsequent gain as it is in the case of a child's return to his natural parents.

The liberty interest is a known and stable home environment. A transfer to another foster home may subject the child to a "grievous loss" mandating due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath, supra; Meachum v. Fano, supra.* The child is thrown into an alien environment in which he/she has no biological or even psychological bonds. Evidence including testimony by experts for both the natural and foster parents in the court below highlighted the possible traumatic effect of repeated transfers from one foster family to another. *OFFER v. Dumpson, supra,* at 282-283; see Robert H. Mnookin, "Foster Care; In Whose Interest?" in

[46]It should be noted, however, that in nearly all situations where a child wishes to remain in a foster home and the foster parent wishes to keep him/her, the foster parent will protect the child's interest either by asserting their statutory rights under SSL § 392, filing an equity action or seeking to institute a neglect proceeding under Article 10 of the Family Court Act.

The Rights of Children, Harvard Educational Review (1974), p. 184.[47]

When a child is transferred from a particular foster home to an institution the deprivation of liberty is even more severe. Conditions in institutions and the effect of institutionalization upon children have been the source of extensive litigation, reports and studies, and popular literature. *NYSARC v. Rockefeller,* 357 F. Supp. 752 (E.D.N.Y. 1973); *Morales v. Turman,* 383 F. Supp. 53 (E.D. Texas 1974); Forer, L., *No One Will Lissen, John Day* (1971); Cole, L., *Our Children's Keepers, Fawcett World* (1974). See also *Bartley v. Kremens,* No. 75-1064, Brief of *Amicus Curiae* American Orthopsychiatric Association, *et al.,* to this Court. Undoubtedly, the transfer triggers application of the due process clause.

Hence, in both transfer of a child to another foster home and to an institution, the question becomes what process is due. *Morrissey v. Brewer, supra.* An application of the three-part test for determining the "specific dictates of due process" enunciated in *Mathews v. Eldridge, supra,* at 903, initially suggests that an evidentiary hearing instituted by the child or an independent party acting on his behalf at which all information regarding the child's needs and desires are made known is necessary. The child, therefore, will need an independent representative who may then call a non-party foster parent to give

[47]The foster parents have no equivalent liberty interest in the foster child. They independently and voluntarily contract to care for the child in return for monetary compensation. *Offer v. Dumpson, supra,* at pages 280-281. As opposed to the natural parent the foster parent has no obligation to care for a child and may sever its relationship with the child whenever it desires to do so. However, the child is subjected to the foster care system usually though no fault of its own and is dependent upon adults for "custody, care and nuture" *Prince v. Massachusetts, supra.*

testimony.[48] The hearing must take place before the transfer. Delay in removal occasioned by a hearing creates no risk of harm (as opposed to delay in returning a child to his natural home) whereas great injury to the child may occur before a post-removal hearing results in a reversal of the transfer.[49]

The suggested hearing will not place an undue fiscal or administrative burden on the child care agencies.[50] In fact, state and local officials in New York currently carry out administrative hearings when requested by foster parents, except when a child is being returned to his natural home. *OFFER v. Dumpson, supra,* at 285. Moreover, to the extent the hearings negate transfers to institutions they will save the state and city substantial sums of money.[51]

In summary, *Amicus* believes that due process procedural protections will have an ameliorative effect. Children will not be shunted unnecessarily from one foster home to another, nor will inappropriate institutionalization be effectuated as easily.

As indicated earlier, the majority of children now in foster care are inappropriately placed.[52] The govern-

[48]The foster parent should not be a party as of right to such a proceeding because it does not have a constitutionally protected liberty interest or statutory right to maintain the child in its home.

[49]An emergency may arise which would warrant immediate removal.

[50]In his deposition in the court below Dr. David Fanshel testified that the tendency of agencies is not to move children from one foster home to another (pp. 70-71).

[51]The per child per year cost in a foster home is $5,200 and in a general institution is $34,000. (Bernstein Report, *supra,* p. 44).

[52]Bernstein Report, *supra,* p. 29.

mental interest in assuring that each child receives appropriate care in no way will be stifled as a result of the implementation of due process procedures. In fact, holding child care officials accountable for their actions concerning foster children will better assure that such actions are legitimate and, therefore, that the governmental interest in providing appropriate child care is being fulfilled.

CONCLUSION

For the foregoing reasons *Amicus* respectfully urges this court to affirm that part of the District Court's judgment and order which declared Social Services Law §§ 383(2) and 400 and 18 New York Code Rules and Regulations 450.14 unconstitutional when applied to a foster child's transfer from a foster home to another foster care placement, *and* to reverse that part of the District Court's judgment and order which declared said statutes and regulations unconstitutional when applied to a foster child's return to the natural home.

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